No. 09-1187

SUPREME COURT, U.S.
FILED
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IN THE

Supreme Court of the United States

DEANNA MCBREARTY, *et al.*,
Petitioners,

v.

THE VANGUARD GROUP, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID BRAFF
PENNY SHANE
AMANDA F. DAVIDOFF
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Respondents John J. Brennan, Charles D. Ellis, Rajiv L. Gupta, Amy Gutmann, Joann Heffernan Heisen, André F. Perold, Alfred M. Rankin, Jr., and J. Lawrence Wilson

KATHLEEN M. SULLIVAN
Counsel of Record
A. WILLIAM URQUHART
HARRY A. OLIVAR, JR.
JASMINE M. STARR
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Respondents The Vanguard Group, Inc., George U. Sauter, and Duane F. Kelly

May 3, 2010

[Additional counsel listed on signature pages]

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether a complaint brought by investors in a mutual fund alleging that the fund invested in publicly traded companies whose stock prices then fell after the government prosecuted them as illegal gambling businesses is properly dismissed for failure to allege proximate causation under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), because, even if the mutual fund's supposed "ownership" or "financing" of illegal gambling businesses were a predicate act, the fall in stock prices was not alleged to be "by reason of" the mutual fund's investments.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state as follows:

1. Respondent The Vanguard Group, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

2. Respondent Acadian Asset Management, LLC ("Acadian") has a parent corporation, Old Mutual Asset Managers (US) LLC, which owns 100% of Acadian's Class A shares (*i.e.*, voting shares) and at least 71.43% of Acadian's Class B shares. Old Mutual Asset Managers (US) LLC is a wholly owned subsidiary of Old Mutual (US) Holdings, Inc., which is a wholly owned subsidiary of OM Group (UK) Limited, which is a wholly owned subsidiary of Old Mutual PLC, which is a publicly traded company. Other than Old Mutual PLC's indirect ownership interest, no publicly held company owns 10% or more of Acadian.

3. Respondent Marathon Asset Management, LLP has no parent corporation, and no publicly held company owns 10% or more of its stock.

4. Respondents Vanguard International Equity Index Fund d/b/a Vanguard European Stock Index Fund and Vanguard Horizon Funds d/b/a Vanguard Global Equity Fund have no parent corporations, and no publicly held companies own 10% or more of their stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners attempted below to state claims under RICO to recover alleged investment losses. They claimed that the mutual funds in which they had invested had committed predicate acts by purchasing publicly traded shares of certain online gambling companies, and that a subsequent government "crackdown" on such companies had caused the companies' stock prices to fall, leading in turn to declines in the value of their investments. Without addressing whether the mutual funds' public stock purchases described by Petitioners could qualify as RICO predicate acts, the Second Circuit found that Petitioners had failed to allege they were injured "by reason of" the mutual funds' purchases of stock, as opposed to the "crackdown."

Contrary to Petitioners' assertions, the lower court's dismissal of Petitioners' novel RICO theory for lack of proximate cause is not in conflict with the decisions of this Court or of other circuits. *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008), involved harm to competing bidders when the defendants rigged an auction. It did not involve intervening causes, and its holding is entirely consistent with the decision below. Nor does the Second Circuit's decision not to include in its summary order a detailed analysis of policy considerations discussed in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), present any conflict with *Holmes*. *Holmes* found that no proximate cause had been alleged where plaintiffs claimed defendants' stock manipulation scheme bankrupted two broker-dealers and forced them to reimburse the broker-dealers' customers; its holding in no way suggests that proximate cause is supported by Petitioners' even more attenuated allegations. With respect to the recent decision in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), not only is there no majority opinion, but the decision below would be affirmed under the reasoning of both the plurality and the dissent. And *Hemi* addressed a claim that failure to report cigarette sales impeded New York City's ability to collect taxes, not any intervening cause such as alleged here. Further, there is no circuit split, for none of the circuit court decisions cited by Petitioners involve investors in a fund that allegedly owned an illegal business or alleged injuries caused by actions of law enforcement.

Respondents respectfully submit that, absent a conflict with decisions of this Court or a circuit split, there is no justification for granting certiorari. This case does not present an issue that is recurring or of

any national importance. It is also a poor vehicle for deciding any RICO proximate cause issue because Respondents have two alternative grounds to support the judgment: the alleged basis for Petitioners' claims, purchases of shares on a public stock exchange, is not a RICO predicate act, and Petitioners and their alleged injuries fall outside the scope of the statute on which they seek to base their RICO suit.

Accordingly, the petition for a writ of certiorari should be denied.

COUNTERSTATEMENT

This case concerns investments made by two Vanguard mutual funds in publicly traded shares of four online gambling companies. Petitioners' complaint alleged that they were investors in the mutual funds, and that Vanguard and its trustees and investment advisors (collectively "Respondents") were liable for declines in the value of the gambling company investments after the U.S. government commenced a "crackdown" on online gambling, causing online gambling companies to withdraw from the U.S. market and their stock prices to drop.

Petitioners identified the gambling companies as Party Gaming PLC, Sportingbet PLC, BWin Interactive Entertainment AG, and NETeller PLC. C.A. App. 134. All four companies are based in Europe and listed on European stock exchanges. C.A. App. 137-52. Petitioners alleged that, "in or about 2006, federal and state law enforcement agencies began a crackdown on illegal gambling businesses . . . . As a result, the stock prices of all such illegal gambling businesses fell substantially." C.A. App. 32. As part of the "crackdown," Congress adopted the Unlawful

Internet Gambling Enforcement Act ("UIGEA"), which prohibited the use of credit cards and wire transfers in connection with certain online gambling. 31 U.S.C. §§ 5361-5367, Pub. L. No. 109-347, Title VIII, 120 Stat. 1952 (Oct. 13, 2006). The New York Times reported that following passage of this legislation on a Friday, shares of some online gambling companies lost "more than half of their value within minutes Monday morning." C.A. App. 278.

Petitioners brought claims, individually and derivatively on behalf of the funds, alleging breach of fiduciary duty, negligence, and waste. In addition to these conventional state-law claims, they also asserted a novel RICO claim based on 18 U.S.C. § 1955, which criminalizes the financing, management, supervision, direction, or ownership of gambling businesses that violate state law. Petitioners theorized that public minority shareholders were guilty of a felony under Section 1955, and this could qualify as a RICO predicate act. Petitioners alleged that the funds had committed crimes by purchasing shares in the public gambling companies, and that Respondents had engaged in a pattern of racketeering activity by causing the funds to so invest.

Respondents filed motions to dismiss on a number of grounds, including failure to plead RICO proximate cause and failure to plead cognizable predicate acts. The district court addressed these RICO issues first, because Petitioners conceded that they would not be able to improve their RICO allegations with amendment. Pet. App. 9a. After considering these issues, the district court dismissed the complaint, finding that "[p]roximate causation is lacking here because the shareholders were injured not by the ownership of or investment in the illegal gambling

operations, but by the reaction of the stock price to the publicity following the government's investigation of those operations." Pet. App. 13a.

In reaching this conclusion, the district court cited a prior decision of the Second Circuit that had affirmed the dismissal of a similarly attenuated RICO claim. Pet. App. 13a-14a (citing *In re American Express Shareholder Litig.*, 39 F.3d 395 (2d Cir. 1994)). In *American Express*, shareholders had asserted RICO claims against American Express on the ground that the company had engaged in mail and wire fraud in defaming a competitor and that its stock price had declined when the illegal activity was publicly disclosed. *Id.* at 396-98. The Second Circuit held that these claims did not allege proximate cause because the decline in stock price was caused by public disclosure of the illegal scheme rather than the scheme itself, and because the shareholders were not the intended victims of the scheme. *Id.* at 400.

The district court concluded that Petitioners had failed to allege proximate cause for similar reasons. First, the court found that Petitioners themselves had alleged that the decline in the gambling companies' shares was caused by the government "crackdown" on online gambling rather than the funds' allegedly illegal investment in those companies. Pet. App. 13a. Second, the court found that investors in the funds, such as Petitioners, were not the intended victims or targets of the funds' allegedly illegal investments, but rather the intended beneficiaries. Pet. App. 14a. This placed them outside the scope of

those the underlying criminal statute, 18 U.S.C. § 1955, sought to protect.[1]

In a two-page summary order, the Second Circuit unanimously affirmed. Pet. App. 2a-5a. The court of appeals held that Petitioners had failed to allege proximate cause because "the decline in the funds' online gambling holdings was not the direct result of the RICO violation—the owning and/or financing of illegal gambling—but rather was the result of the subsequent 'government crackdown' on the illegal gambling." Pet. App. 4a.

REASONS FOR DENYING THE WRIT

The application of RICO's proximate cause requirement in the decision below does not raise any question warranting review by this Court. Petitioners fail to identify any conflict with this Court's precedent or split among the circuits. To the contrary, the Second Circuit's summary order is consistent with the holdings in *Bridge*, 128 S. Ct. 2131, *Holmes*, 503 U.S. 258, and *Hemi*, 130 S. Ct. 983 concerning RICO proximate cause. Nor is there any conflict among the circuits concerning the absence of proximate cause in this case. Further, the petition does not present an issue that is recurring or of national importance, but rather a novel, *sui generis* theory that seeks to invoke RICO to recover investment losses. In addition, this case is a poor vehicle in which to address RICO proximate cause, as there are

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[1] Because there were no federal claims remaining, the district court declined to exercise supplemental jurisdiction over Petitioners' state law claims Pet. App. 15a. Petitioners have since refiled their purported state law claims in Delaware Chancery Court. *Hartsel v Vanguard*, No. 5394 (filed Apr 7, 2010)

alternative grounds for affirming the decision below. The decision below was correct, in accord with years of precedent, and does not warrant this Court's attention.

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

A. There Is No Conflict With The Decisions Of This Court.

Although Petitioners contend that the decision below conflicts with this Court's decisions in *Bridge*, 128 S. Ct. 2131, *Holmes*, 503 U.S. 258, and *Hemi*, 130 S. Ct. 983, those cases did not involve the question presented here, and the decision below was consistent with their holdings.

1. The Second Circuit's decision does not conflict with this Court's holding in *Bridge*. Nothing in *Bridge* supports Petitioners' theory that alleged RICO violators can bring RICO claims when "contributing causes—including government action—had intervened" to put an end to the alleged RICO violations. Pet. 7-8.

In *Bridge*, a county held an annual public auction to sell tax liens on property of delinquent taxpayers. 128 S. Ct. at 2135. The bidding often produced ties, and the county allocated wins among tying bidders on a rotational basis. *Id.* To make the allocation fair, the county required that each bidder submit bids only in its own name. *Id.* The plaintiffs in *Bridge* were bidders who had received fewer parcels because defendants had illegally disguised their identities, by using agents, to acquire a disproportionate share of parcels. *Id.* at 2136.

The question before this Court in *Bridge* was whether a RICO claim could be based upon mail fraud without alleging first party reliance. *Id.* at 2137. *Bridge* did not address intervening cause (mentioning it only in passing, *id.* at 2144), because there was no intervening government action disrupting the predicate acts; the government action was routine administration of an auction. There was never any change in the government's action that led to plaintiffs' losses. As this Court recognized, there were "no independent factors that account for [plaintiffs'] injury." *Id.* Nothing suggests that if the plaintiffs in *Bridge* had been investors in the companies that submitted fraudulent bids, injured after the government took away their illicit wins, they would somehow have RICO claims.

2. Petitioners also contend that the decision below conflicts with this Court's decision in *Holmes*. Pet. 13-15. *Holmes*, however, did not consider whether RICO's proximate cause requirement could be satisfied by a decline in the value of an investment caused by a government crackdown on alleged predicate acts. Instead, it considered the much more basic question whether RICO incorporates a proximate cause requirement, and held that RICO requires a direct relation between the injury asserted and the predicate acts. *See* 503 U.S. at 265-70. In addition, in applying the proximate cause requirement, *Holmes* held that the chain of causation in that case was too attenuated because the plaintiff had alleged it was injured by a stock manipulation scheme that bankrupted two broker-dealers and in turn forced it to reimburse the broker-dealers' customers. *See id.* at 270-75.

Petitioners contend that the decision below conflicts with *Holmes* because the Second Circuit "refused to rely on [the *Holmes*] factors, dismissing them as nothing more than the 'underlying premises' of the proximate cause requirement." Pet. 15. But, as the decision below recognized, Pet. App. 5a, *Holmes* did not adopt a rigid three-factor test; it merely observed that a direct relation between the asserted injury and the alleged predicate act is required "for a variety of reasons." *Holmes*, 503 U.S. at 269. This Court has recognized that the factors identified in *Holmes* are "the directness requirement's *underlying premises*," using the exact same words Petitioners criticize the Second Circuit for using. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (emphasis added); *see also Bridge*, 128 S. Ct. at 2142 (noting that the factors support the "direct-relation requirement").

Petitioners' suggestion that review of the Second Circuit's summary order is necessary because it lacked a lengthy discussion of *Holmes* is unwarranted; if lack of lengthy discussion merited a grant of certiorari, every summary order would be a strong certiorari candidate. Moreover, there was no need for the Second Circuit to engage in detailed analysis of each *Holmes* factor, for its prior decisions rejecting similarly attenuated RICO claims had performed such analyses. The Second Circuit's citation to its prior cases, such as *American Express*, does not amount to applying a "mechanical rule." The Second Circuit analyzed Petitioners' RICO theory under prior precedents applying *Holmes*, and found that proximate cause could not be established.

3. There is also no conflict with *Hemi*. *Hemi* did not involve a government crackdown or an alleged

injury resulting from declines in a company's stock price. In that case, the City of New York sued a tobacco seller for failing to disclose customer information, which impeded the City's ability to collect sales tax from those customers. *See* 130 S. Ct. at 987-88 (plurality op.). Far from suggesting any conflict between *Hemi* and the decision below, Petitioners simply observe that *Hemi* involved an injury to a third party caused by a fourth party, rather than a "first step" injury, which they purport to assert here. Pet. 21. Petitioners themselves acknowledge that there is no binding determination in *Hemi* because of the lack of any agreement by a majority of the Court, Pet. 13 n.4, and none of the *Hemi* opinions suggested that all "first step" injuries (even if the allegations here somehow qualified) satisfy the proximate causation requirement. In *Hemi*, the plurality found that, "in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." 130 S. Ct. at 991. The decision below does not conflict with any decision of this Court.

B. There Is No Conflict With Other Circuits.

Petitioners also argue that the decision below conflicts with the decisions of other circuits. Pet. 10-11, 21. They fail to show any conflict, however, because none of the cases they cite involved investors in an entity that was alleged to have owned an illegal enterprise or an injury caused by law enforcement.

Several cases cited by Petitioners found proximate cause on their particular facts but are inapposite. For example, two cases cited by Petitioners involved employees alleging that their employers engaged in "schemes to depress wages of legal workers by wide-

spread hiring of illegal workers." *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1290 (11th Cir. 2006); *accord Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 605 (6th Cir. 2004). These courts found proximate causation had been alleged because the employers' alleged scheme, unlike the investments here, had "the purpose and direct result" of hiring illegal aliens because they accepted low wages, thereby depressing the wages of legal workers. *See Williams*, 465 F.3d at 1289; *Trollinger*, 370 F.3d at 605, 618-19. Another case involved allegations that union negotiators agreed to costly concessions for their members, causing a direct injury in exchange for covert personal benefits. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1392-93 (11th Cir. 1994). None of these cases involved intervening causes such as the "crackdown" alleged here. Rather, all involved direct injuries.

Other cases cited by Petitioners found proximate causation where, unlike here, the conduct at issue was targeted at the plaintiffs. For example, in *Mid Atlantic Telecom, Inc. v. Long Distance Servs. Inc.*, 18 F.3d 260 (4th Cir. 1994), a telecommunications company claimed that a competitor fraudulently added time to its bills so that it could present deceptively low rates and poach customers. *Id.* at 261. Because the telecommunications company allegedly was the "direct target" of the competitor's fraudulent scheme, the Fourth Circuit found proximate cause had been adequately alleged. *Id.* at 263-64; *see also Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008) (finding that proximate cause allegations were sufficient where plaintiff alleged that competitor fraudulently extended lease agreements and service contracts with customers); *RWB Services, LLC v. Hartford Computer Group,*

Inc., 539 F.3d 681, 687-88 (7th Cir. 2008) (finding proximate cause allegations sufficient where plaintiff was allegedly "direct victim" of alleged scheme to fraudulently keep returned cameras and repackage as new). None of these cases involved situations, such as this one, where the plaintiffs were investors in the very entities that allegedly engaged in racketeering activity or where law enforcement had caused the alleged injuries.[2]

Finally, Petitioners allege there is a circuit split over the application of *Holmes*, noting that, unremarkably, cases from other circuits have considered the *Holmes* factors in determining proximate cause. Pet. 16. But there is no conflict, let alone a square one, between these cases and the decision below, because the Second Circuit cited cases showing that the *Holmes* factors do not support proximate cause under circumstances such as those here. Pet. App. 4a. Petitioners have yet to point to any decision in any circuit (or this Court) that permitted RICO claims to proceed where the injuries were caused by the interruption of the predicate acts, as alleged here.

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[2] Petitioners assert that two other court of appeals' decision conflict with the decision below, but neither of these decisions found the allegations of proximate cause were adequate. *See Oki Semiconductor Co v Wells Fargo Bank, Nat'l Ass'n*, 298 F.3d 768, 774 (9th Cir. 2002), *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F 3d 912, 933 (3d Cir 1999)

II. THE PETITION DOES NOT PRESENT AN IMPORTANT AND RECURRING ISSUE, AND IS A POOR VEHICLE TO RESOLVE ANY RICO ISSUE.

The petition should also be denied because Petitioners present a novel RICO theory that is unlikely to recur and presents no issue of national importance. And this case is a poor vehicle for resolving questions about RICO proximate cause, because there are alternative grounds for affirming the judgment.

Petitioners have not shown that this case presents a recurring question. Citing a single newspaper article, they assert this case may affect the rights of individuals who invested in mutual funds that bought shares in publicly traded gambling companies. Pet. 12 n.3. However, they cite only two other cases in which RICO claims have been brought by such individuals, and they fail to disclose that petitioners' counsel represented the plaintiffs in both cases. *See* Civil Docket, *Wodka v. Causeway Capital Mgmt., LLC*, No. 09-cv-02625 (C.D. Cal.) (listing Hanly Conroy Bierstein Sheridan Fisher & Hayes, LLP as counsel for plaintiffs); Civil Docket, *Seidl v. Am. Century Cos., Inc.*, No. 08-cv-08857 (S.D.N.Y.) (same). Because Petitioners allege the "crackdown" on gambling companies occurred four years ago, any further claims would likely be time-barred. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987) (four-year statute of limitations applies to civil RICO claims). Thus, far from a recurring, national issue, the theory presented in this case is the non-recurring brainchild of one set of plaintiffs' lawyers.

Contrary to Petitioners' suggestion, the decision below will not insulate mutual funds that make alle-

gedly improper investments. *See* Pet. 12. To the extent investors have a basis for pursuing claims, they could seek to assert state law claims for negligence, breach of fiduciary duty, and waste—the same theories Petitioners themselves have asserted, now in more than one court. *See supra* p.6 n.1.

Petitioners argue that certiorari should be granted to clarify confusion in the *Hemi* opinions concerning the role of foreseeability in RICO causation. Pet. 26. But Petitioners have not made any showing that this is an important or recurring issue. Even if it were, consideration of the alleged confusion about *Hemi* would be premature because *Hemi* was decided only months ago. Before its issues are revisited, *Hemi* should be given an opportunity to percolate in the lower courts, so that this Court has the benefit of their views on whether there really is any confusion and how to resolve it. The summary order below, decided before *Hemi*, provides no views on how *Hemi* should be applied.

In addition, this case would be a poor vehicle for revisiting any issues in *Hemi*, because there are alternative bases for the judgment: the failure to plead a predicate act and the failure of Petitioners to fall within the scope of the predicate act statute. Petitioners argued below, and argue here, that purchases of any amount of publicly traded shares of online gambling companies constitute "financing" or "owning" the companies in violation of 18 U.S.C. § 1955, which prohibits "financ[ing]" or "own[ing]" an illegal gambling business. Petitioners' expansive view of Section 1955 would make a felon out of anyone who purchases a minimal interest in a publicly owned gambling company, including passive investors, and even index funds. In the lower courts,

Petitioners did not cite any authority supporting this novel interpretation, nor did they point to a single investigation or prosecution of a public shareholder under Section 1955. Although the district court found it unnecessary to resolve this question in view of its decision for Respondents on the proximate cause issue, Petitioners' novel views of criminality are central to their complaint.

Petitioners' RICO theory also fails because their claims fall outside the scope of the statute on which they seek to rely. *See Hemi*, 130 S. Ct. at 994 (Ginsburg, J., concurring in part and concurring in the judgment) (rejecting claim "outside the scope of the very statute on which [the plaintiff] builds its RICO suit"); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 284 (2d Cir. 2006) ("When a plaintiff brings suit under RICO—as with any 'suit on a statute'—he or she must show both that he or she is within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent."). Although Petitioners contend that the funds' investments ran afoul of a statute that prohibits owning or financing gambling companies (18 U.S.C. § 1955), they themselves stood to gain as beneficiaries while the alleged RICO violations were occurring uninterrupted. This puts them outside any class the statute seeks to protect. *See Lerner*, 459 F.3d at 284. Nor is the alleged "harm done"—a decrease in the value of investments in the allegedly criminal enterprise—the harm the criminal statute "sought to avoid." *Id.* Respondents briefed this issue below and the district court's opinion was based in part on its finding that Petitioners were not intended victims or targets of the alleged racketeering. Pet. App. 14a. Although the issue was not addressed in the Second Circuit's

summary decision, it too would provide adequate basis for affirming the dismissal below.

III. THE DECISION BELOW WAS CORRECT AND IN ACCORD WITH YEARS OF PRECEDENT.

Certiorari should also be denied because the Second Circuit was correct in summarily holding that Petitioners did not allege proximate cause.

To establish proximate cause under RICO, a plaintiff must show a direct causal connection between the alleged illegal predicate acts and the alleged injury. The RICO statute authorizes suits by persons injured "by reason of" a RICO violation. 18 U.S.C. § 1964(c). This provision incorporates the concept of proximate cause, *Holmes*, 503 U.S. at 265-68, and, in particular, a version of that concept requiring "some direct relation between the injury asserted and the injurious conduct alleged," *id.* at 268. The central question in applying RICO's proximate cause requirement is "whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 547 U.S. at 461.

Petitioners failed to allege a direct causal connection. They did not allege that they were injured after the supposedly illegal stock purchases. Instead, they alleged that they were injured because state and local governments later commenced a crackdown on illegal gambling businesses, which included new federal legislation, and that "*[a]s a result*, the stock prices of all such illegal gambling businesses fell substantially." C.A. App. 32 (emphasis added). In their briefing before the district court, they further conceded that "the injury of which [Petitioners] complain (the loss in value of their mutual fund shares) flowed directly from the loss of illicit revenue suffered by

the unlawful gambling businesses when authorities stepped up enforcement of the criminal laws." C.A. App. 438. Given Petitioners' admissions that their alleged injuries were caused directly by law enforcement decisions, and particularly because such decisions are inherently discretionary, they could not allege the direct connection required to establish proximate cause under RICO. *Cf. Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (holding that intervening decision of prosecutor to bring charges broke the chain of causation between the acts of the defendant officers and the defendant's prosecution); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (same).

This outcome is confirmed by the *Holmes* principles. The first principle, that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors," 503 U.S. at 269, supports dismissal here because it would be impossible to determine what portion of the decline in a company's share price was attributable to an initial investment decision as opposed to an intervening "crackdown" or general market forces.

The second *Holmes* principle also supports dismissal, because Petitioners' novel RICO theory would require "courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.* As the district court recognized, the direct victims of an illegal gambling operation are gamblers and competing, legal gambling businesses. Pet. App. 14a. Such victims are at a different "level[] of injury" from investors in alleged

owning/financing entities, such as Petitioners, who stood to gain from the success of allegedly illegal gambling operations and now claim injury because their investments turned out not to be profitable.

The third consideration set forth in *Holmes*, that "directly injured victims can generally be counted on to vindicate the law as private attorneys general," 503 U.S. at 269-70, also supports the outcome here. The more directly injured victims of illegal gambling enterprises, such as gamblers who used the enterprises and legitimate gambling businesses that competed with them, are in a position to bring suit if any RICO suits are needed. By contrast, investors such as Petitioners cannot be counted on to deter the alleged predicate acts because they stand to benefit from the alleged illegality until there is an intervening factor, such as the government "crackdown," that causes investment losses. And there is no need to extend the scope of RICO to encompass injuries traceable to law enforcement activity because the law enforcement activity itself will deter the underlying predicate act.

Finally, the decision below is correct under the reasoning of both the plurality and dissent in *Hemi*. In *Hemi*, the plurality found that, "in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." 130 S. Ct. at 991. The "first step" in the chain of causation alleged by Petitioners was the funds' purchase of publicly traded shares in online gambling companies. Petitioners were not injured after this "first step." They only claim to have been injured after the government commenced a "crackdown," Congress adopted UIGEA, the online gambling companies withdrew from the U.S. market, and their share

prices declined. This is not a direct or "first step" injury.

The lower court's order also is correct under the dissent's reasoning. Justice Breyer maintained that proximate cause was established because "the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to prevent." 130 S. Ct. at 997-98. Here, Petitioners have not alleged that the funds' losses were what the funds intended or desired, and losses incurred by investors in a gambling company are not within the risks Congress sought to prevent when it criminalized ownership of certain gambling companies. *See also id.* at 994 (Ginsburg, J., concurring in part and concurring in the judgment) (rejecting claim "outside the scope of the very statute on which [the plaintiff] builds its RICO suit").

The Second Circuit correctly held that proximate cause was not properly alleged in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID BRAFF
PENNY SHANE
AMANDA F. DAVIDOFF
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Respondents John J. Brennan, Charles D. Ellis, Rajiv L. Gupta, Amy Gutmann, Joann Heffernan Heisen, André F. Perold, Alfred M. Rankin, Jr., and J. Lawrence Wilson

ROBERT M. DATO
MICHAEL CERESETO
L. RICHARD WALTON
BUCHALTER NEMER, P.C.
1000 Wilshire Boulevard
Suite 1500
Los Angeles, CA 90017
(213) 891-0700

Counsel for Respondents Marathon Asset Management, LLP and Neil M. Ostrer

KATHLEEN M. SULLIVAN
Counsel of Record
A. WILLIAM URQUHART
HARRY A. OLIVAR, JR.
JASMINE M. STARR
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Respondents The Vanguard Group, Inc., George U. Sauter, and Duane F. Kelly

KENNETH S. LEONETTI
BRANDON F. WHITE
KIRK G. HANSON
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000

Counsel for Respondents Acadian Asset Management, LLC, Ronald D. Frashure, John R. Chisholm, and Brian K. Wolahan

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